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In the Supreme Court of the United States

OCTOBER TERM, 1977

EVERETT C. MCKETHAN, PETITIONER

v.

UNITED STATES OF AMERICA

EARL A. GARNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1545

EVERETT C. MCKETHAN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 77-1557

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UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A)[1] is not yet reported.

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[1] "Pet. App." refers to the appendix to the petition in No. 77-1545.

JURISDICTION

The judgment of the court of appeals was entered on February 17, 1978. After consideration of a petition for rehearing, the court issued a revised opinion on March 30, 1978. The petition for a writ of certiorari in No. 77-1545 was filed on April 28, 1978, and the petition in No. 77-1557 was filed on April 29, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the grand jury testimony of a witness who was unavailable at trial for direct examination by the government or full cross-examination by petitioners was properly admitted into evidence under Rule 804(b)(5) of the Federal Rules of Evidence.

2. Whether introduction of the witness's grand jury testimony at trial violated the Confrontation Clause of the Sixth Amendment.

3. Whether, on the facts of this case, petitioner Garner was properly convicted of both conspiracy to import heroin, in violation of 21 U.S.C. 963, and conspiracy to distribute heroin, in violation of 21 U.S.C. 846.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner Garner was convicted of conspiracy to import heroin, in violation of 21 U.S.C. 963, conspiracy to distribute

and to possess with intent to distribute heroin, in violation of 21 U.S.C. 846, and importation of heroin, in violation of 21 U.S.C. 952(a). Petitioner McKethan was convicted of conspiracy to import heroin, in violation of 21 U.S.C. 963, and traveling in foreign commerce in furtherance of the unlawful heroin importation enterprise, in violation of the Travel Act, 18 U.S.C. 1952. Petitioner Garner was sentenced to consecutive terms of ten years' imprisonment and three years' special parole on each count. Petitioner McKethan was sentenced to five years' imprisonment and three years' special parole on his conspiracy conviction and to a consecutive one-year term of imprisonment on the Travel Act conviction. The court of appeals affirmed, with one judge dissenting in part (Pet. App. A).

Petitioners were charged as principal participants in conspiracies formed in July 1974 for the purpose of importing large quantities of heroin into the United States from Europe and then distributing the narcotics in the Washington, D.C. area. Among those named as co-conspirators with petitioners were Warren Robinson, Mary McKee, Henry Thompson, Teresa Hallums and Thomas Harley. At trial, the government sought to rely heavily on the testimony of Robinson, who had pleaded guilty to two charges based on his role in the heroin importation and distribution enterprise prior to trial and had appeared as a witness before the grand jury (Pet. App. 4a-5a). When called as a witness at trial, however, Robinson refused to testify (Pet. App. 5a). He persisted in this refusal

without explanation even after he had been granted use immunity and had been threatened by the district court with contempt (*ibid.*). The court then ruled that Robinson was unavailable as a witness and allowed his grand jury testimony to be admitted into evidence pursuant to Rule 804(b)(5), Fed. R. Evid. (Tr. 320).

Robinson's grand jury testimony established that in 1974 petitioner Garner approached him with information that petitioner McKethan had a source for large quantities of heroin in West Germany (G. Ex. 70, p. 9). During the next several months, petitioners and Robinson traveled to Europe on eight separate occasions to purchase the heroin. On a trip to Frankfurt in July or August 1974, petitioner McKethan introduced petitioner Garner to his contact, known as "T," from whom they purchased about ten ounces of heroin for $12,000 (*id.* at 12-13).[2] Petitioner Garner transported the heroin to the United States, and he and Robinson sold it in the Washington area for about $25,000 (*id.* at 13). Robinson later paid petitioner McKethan $10,000 for his assistance in the transaction (*id.* at 45-46). The profits from these sales were used by petitioners and Robinson to make additional visits to West Germany and Holland for the purpose of purchasing larger and larger quantities of heroin, culminating in March 1975 with the purchase of two kilograms of heroin in Amsterdam for

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[2] "T" was a code name for Thompson, petitioner McKethan's cousin (Pet. App. 9a).

$90,000 (*id.* at 57). Robinson traveled with petitioner Garner on two of these trips and was informed by petitioners of the other ones.

On one of the European trips petitioner Garner and Robinson were accompanied by McKee and Hallums, who returned separately to the United States with the heroin concealed in their girdles. The women subsequently delivered the narcotics to petitioner Garner and Robinson (G. Ex. 70, pp. 21-27). McKee testified at trial and fully corroborated Robinson's description of the trip (Tr. 172-190). Records of airline tickets, custom declarations, passport endorsements, and European hotel registrations also confirmed that petitioner McKethan had made five trips to western Europe between July 1974 and March 1975 and that petitioner Garner had made seven such trips in the same period (Pet. App. 8a-9a). These records further showed that petitioner McKethan had been in Amsterdam in early September 1974, about the time Robinson testified that he had arranged petitioners' first contact with a Chinese supplier in that city (*id.* at 9a). Petitioners were also in Copenhagen at the same time in December 1974 and apparently were on the same flights to Copenhagen and Amsterdam in March 1975 (*ibid.*).

ARGUMENT

1. Petitioners contend that the district court erred in admitting Robinson's grand jury testimony because (a) the testimony did not satisfy the "trustworthiness" requirement of the exception to the hearsay rule

provided by Rule 804(b)(5) of the Federal Rules of Evidence and (b) admission of the testimony, even if authorized by Rule 804(b)(5), violated the Confrontation Clause of the Sixth Amendment.

a. Rule 804(b)(5), Fed. R. Evid., provides:

> **Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> * * * * *
>
> (5) **Other exceptions.** A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Thus, contrary to petitioners' assertions (Pet. 13; Pet. No. 77-1557, p. 9), testimony before a grand jury is not made routinely admissible by Rule 804(b)(5). The Rule requires that before an out-of-court

statement may be introduced at trial the district court must determine that the declarant is unavailable, that "the statement is offered as evidence of a material fact," that "the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts," and that "the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence." Petitioners apparently do not dispute that these conditions were satisfied here.

The Rule also requires that the statement have "circumstantial guarantees of trustworthiness" equivalent to the traditional hearsay exceptions listed elsewhere in Rule 804, namely, prior testimony subject to cross-examination, dying declarations, statements against interest, or statements of personal or family history. In this case the court of appeals carefully assessed Robinson's grand jury testimony—which was based on his personal knowledge, which was given under oath, and for which he was subject to the penalties of perjury—in light of all of the other evidence at trial and properly found that the "strong indicators of reliability" (Pet. App. 8a) present here were sufficient to satisfy the trustworthiness requirement of the Rule (*id.* at 7a-12a). See *United States* v. *West*, C.A. 4, Nos. 76-1837 through 76-1843, decided February 13, 1978 (reproduced in Pet. App. B); *United States* v. *Carlson*, 547 F. 2d 1346, 1354 (C.A. 8), certiorari denied, 431 U.S. 914.

The court below noted that McKee, who had accompanied Robinson and petitioner Garner to Amsterdam on their trip in October 1974, testified at trial and fully corroborated the details of Robinson's grand jury testimony about the trip (Pet. App. 8a). Furthermore, records of airline tickets, customs declarations, passport endorsements, and European hotel registrations provided "irrefutable evidence of [the] travels" of petitioners, Robinson and Thompson, a co-conspirator used initially as a heroin contact and then as a courier (*id.* at 8a-10a). Finally, petitioner McKethan's testimony at trial failed to provide a credible explanation of those travels (*id.* at 10a-11a). In sum, as the court of appeals concluded, "[t]he only believable explanation of the frequent trips is that offered by Robinson in his grand jury testimony, and the record of the trips strongly tends to corroborate the testimony" (*id.* at 10a). This factual determination, concurred in by both courts below, does not require further review.[3]

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[3] Petitioners' claim that the court of appeals' holding conflicts with *United States* v. *Gonzalez*, 559 F. 2d 1271 (C.A. 5), is unfounded. In *Gonzalez*, the court held only that the particular grand jury testimony in that case was not sufficiently reliable to be admitted under Rule 804(b)(5). Unlike Robinson's testimony, the grand jury testimony in *Gonzalez* did not provide detailed facts concerning the defendant and was not corroborated by substantial other evidence in the case, and the declarant was an unwilling witness who agreed to testify only after he had been threatened with repeated appearances before successive grand juries and an unlimited number of six-month contempt sentences if he did not testify and name his co-conspirator. *Id.* at 1272-1273. In other in-

b. Petitioners' contention that the admission of Robinson's grand jury testimony violated the Confrontation Clause is also incorrect. To begin with, this is not a case, such as *Pointer* v. *Texas*, 380 U.S. 400, in which an out-of-court declarant was completely unavailable for confrontation by the defense. After his grand jury testimony had been read to the jury, Robinson was called to the stand by defense counsel and testified that he had told the government attorney that his grand jury testimony was inaccurate (Tr. 565). He also asserted that he had had no drug dealings with petitioners (Tr. 565, 568). Robinson then repeated his earlier statement that he was not going to testify, and, in response to most further questions, he either stated that he had no knowledge or he refused to answer (Tr. 565-576). Thus, although the cross-examination was restricted, the jury did have the opportunity to see and hear Robinson testify on the matter, and, as the court of appeals observed, what they saw and heard may well have been of substantial assistance in assessing the truthfulness of Robinson's grand jury testimony (Pet. App. 12a). See *Barber* v. *Page*, 390 U.S. 719, 725.

The Confrontation Clause has never been construed to create an absolute bar to the admission of hearsay testimony by an unavailable declarant. See *Chambers*

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stances, in which the out-of-court testimony was more reliable, the Fifth Circuit, like the Fourth, has upheld the admissibility of evidence under Rule 804(b)(5). See *United States* v. *Ward*, 552 F. 2d 1080, 1083 (C.A. 5), certiorari denied, No. 76-6920, October 3, 1977.

v. *Mississippi*, 410 U.S. 284, 295. As the Court noted in *Dutton* v. *Evans*, 400 U.S. 74, 89, "the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials * * *." Hence, hearsay testimony is frequently introduced in the form of, *e.g.*, former testimony, dying declarations, and statements against interest, and, although the defendant may be deprived of the opportunity literally to "confront" his accuser at trial, the constitutionality of admitting such evidence has repeatedly been upheld. See, *e.g.*, *Mattox* v. *United States*, 156 U.S. 237, 243; *Kirby* v. *United States*, 174 U.S. 47, 61; *Pointer* v. *Texas*, *supra*, 380 U.S. at 407; *California* v. *Green*, 399 U.S. 149, 165-168. See generally McCormick on *Evidence* 606-607 (2d ed. 1972). The Sixth Amendment is not offended in these situations because the hearsay statement carries a substantial guarantee of reliability, either because of its context or its content, and the obvious need for the evidence, lest the truth-finding process be perverted, outweighs the arguments advanced for exclusion.

The proposed Federal Rules of Evidence, as prescribed by this Court and transmitted to Congress, contained a residual hearsay exception in addition to these traditional exceptions because, according to the Advisory Committee Notes, it would be "presumptuous to assume that all possible desirable exceptions to the hearsay rule have been catalogued * * *" (56 F.R.D. 183, 320). See *Snyder* v. *Massachusetts*, 291 U.S. 97, 107 ("The exceptions [to the hearsay rule]

are not even static, but may be enlarged from time to time if there is no material departure from the reason of the general rule"). See also *Mattox* v. *United States*, *supra*, 156 U.S. at 243-244. Although the House Committee on the Judiciary voted to delete the residual exception because it felt that the provisions injected "too much uncertainty into the law of evidence and [might impair] the ability of practitioners to prepare for trial" (H.R. Rep. No. 93-650, 93d Cong., 1st Sess. 5-6 (1973)), the Senate Judiciary Committee adopted Rule 804(b)(5) and its counterpart, Rule 803(24), in their present form. The Senate Committee observed that the rules were not intended as "a broad license" to trial judges to admit hearsay testimony but were designed for "exceptional circumstances," and it admonished judges to "exercise no less care, reflection and caution than the courts did under the common law in establishing the now-recognized exceptions to the hearsay rule." S. Rep. No. 93-1277, 93d Cong., 2d Sess. 20 (1974). The Senate proposals were accepted by the Conference Committee and enacted into law. See *United States* v. *Medico*, 557 F. 2d 309, 314-315 (C.A. 2), certiorari denied, No. 77-5210, December 5, 1977.

Rule 804(b)(5) thus satisfies the central concerns of the Confrontation Clause by prohibiting the introduction of out-of-court statements of an unavailable declarant unless the statements meet three specified criteria, which confine the availability of the exception to a limited group of cases in which the public

need for the evidence is apparent, and also contain substantial guarantees of trustworthiness equivalent to those that gave rise at common law to the established hearsay exceptions recognized elsewhere in the Rule.[4] The court below was sensitive to these Sixth Amendment considerations, remarking in its opinion in *United States* v. *West*, *supra*, that "[e]ach case must be examined on its own facts" and refusing to hold that "all hearsay admissible under the 804(b)(5) exception to the rule against hearsay can be admitted without violation of the Confrontation Clause rights of a defendant" (Pet. App. 27a n. 7).[5] After a thorough review of the circumstances of this case, the court held only that, in light of the substantial indications of reliability discussed above, the admission of Robinson's prior testimony was authorized by Rule 804(b)(5) and did not violate the interests protected by the Confrontation Clause. See *Dutton* v. *Evans*, *supra*, 400 U.S. at 89; *United States* v. *Bailey*, 439 F. Supp. 1303, 1306-1308 (W.D. Pa.).[6]

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[4] Even if the stringent requirements of the Rule have been satisfied, the trial judge possesses discretion to refuse admission of the evidence for other reasons. See Fed. R. Evid. 403; 4 Weinstein's *Evidence* ¶ 804(b)(5)[01] at p. 804-102 (1977).

[5] Thus, petitioner McKethan's statement that the court of appeals "equat[ed] the question of admissibility under the rules of evidence with admissibility under the Confrontation Clause" (Pet. 10) is incorrect.

[6] This holding does not conflict with *United States* v. *Fiore*, 443 F. 2d 112 (C.A. 2), where the court stated that the admission of the grand jury testimony of a witness not subject to cross-examination at trial "would appear to offend not only

3. Petitioner Garner received consecutive sentences of ten years' imprisonment on his convictions of conspiracy to import heroin, in violation of 21 U.S.C. 963, and conspiracy to distribute heroin, in violation of 21 U.S.C. 846. He argues (Pet. 14-16) that the government proved only a single agreement encompassing both importation and distribution and that the imposition of successive sentences runs afoul of this Court's ruling in *Braverman* v. *United States*, 317 U.S. 49.

From the facts adduced at trial, however, the jury might reasonably have concluded that petitioner Garner engaged in two conspiracies, one to import the heroin and another to distribute the drug within the United States. The evidence did not suggest that petitioner McKethan was a part of the distribution business conducted jointly by petitioner Garner and Robinson (Pet. App. 10a-11a). Rather, petitioner McKethan's role was to locate foreign sources and assist in the importation scheme in Europe (*id.* at 11a). Thus, the jury could have concluded that petitioner Garner entered into an agreement with petitioner McKethan and others to import the heroin and had a separate agreement with Robinson and others to distribute that heroin. Indeed, the jury's acquittal of

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the hearsay rule * * * but the confrontation clause * * * as well." *Id.* at 115. *Fiore* was decided before the adoption of Rule 804(b)(5), and the witness in that case, unlike Robinson, was not subjected to even a limited cross-examination. The Second Circuit subsequently has upheld the admission of evidence under Rule 804(b)(5) where "several factors contribute[d] to the reliability of [the] testimony." *United States* v. *Medico*, *supra*, 557 F. 2d at 315.

petitioner McKethan on the charge of conspiracy to distribute heroin, while convicting him of conspiracy to import it, strongly supports this conclusion.

However that may be, petitioner's reliance on *Braverman* v. *United States*, *supra*, is misplaced. Although the Court concluded in *Braverman* that a single agreement to commit several unlawful acts could not be punished by multiple convictions under the general conspiracy statute, 18 U.S.C. 371, its holding did not reach the situation, presented here, where two specific conspiracy statutes are violated. This was settled in *American Tobacco Co.* v. *United States*, 328 U.S. 781, where the defendants, convicted of conspiracy to restrain trade, in violation of Section 1 of the Sherman Act, and conspiracy to monopolize, in violation of Section 2 of that statute, argued that *Braverman* barred two convictions for what they alleged was "but one conspiracy, namely, a conspiracy to fix prices" (328 U.S. at 788). This Court rejected the claim, holding that a single agreement with several unlawful objects might amount to more than one conspiracy if different elements of the agreement violate different conspiracy statutes: "In contrast to the single conspiracy described in [*Braverman*] in separate counts, all charged under the general conspiracy statute [18 U.S.C. 371], we have here separate statutory offenses, one a conspiracy in restraint of trade that may stop short of monopoly, and the other a conspiracy to monopolize that may not be content with restraint

short of monopoly. One is made criminal by § 1 and the other by § 2 of the Sherman Act" (*ibid.*).[7]

The same reasoning applies here. Petitioner violated two distinct criminal statutes, each aimed at preventing a different evil and each prescribing a separate punishment.[8] In enacting these statutes, Congress determined that a conspiracy both to import heroin into the United States and to distribute the heroin within the country presented greater harm to our nation, and hence was deserving of greater potential punishment, than did a conspiracy to import heroin for personal use or a conspiracy to distribute heroin already available within the country. Accordingly, the court of appeals properly upheld the multiple convictions and consecutive sentences imposed upon petitioner Garner on the conspiracy counts. Accord, *United States* v. *Warholic*, C.A. 9, No. 76-1206, decided December 10, 1976 (unpublished), certiorari denied, 431 U.S. 905; *United States* v. *Arteaga-Limones*, 529 F. 2d 1183, 1194 (C.A. 5), certiorari denied, 429 U.S. 920; *United States* v. *Houltin*, 525 F. 2d 943, 950-952 (C.A. 5), vacated on other grounds

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[7] It is clear that Congress may punish separately several aspects of a single transaction without offending the Double Jeopardy Clause. See *Gore* v. *United States*, 357 U.S. 386, 389-390; *Blockburger* v. *United States*, 284 U.S. 299, 301-304.

[8] Sections 846 and 963 of Title 21 were passed as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 84 Stat. 1236. Congress would have enacted only a single narcotics conspiracy statute if petitioner Garner's assertions regarding legislative intent (Pet. 15) were correct.

sub nom. Croucher v. *United States*, 429 U.S. 1034; *United States* v. *Marotta*, 518 F. 2d 681, 684-685 (C.A. 9). See also *United States* v. *James*, 494 F. 2d 1007, 1025-1026 (C.A. D.C.), certiorari denied *sub nom. Jackson* v. *United States*, 419 U.S. 1020.

We recognize that two circuits, relying on *Braverman*, have held that an individual who enters into a single agreement to import and to distribute a controlled substance may not be separately convicted and punished under Sections 846 and 963. *United States* v. *Rivera Diaz*, 538 F. 2d 461 (C.A. 1); *United States* v. *Honneus*, 508 F. 2d 566 (C.A. 1), certiorari denied, 421 U.S. 948; *United States* v. *Adcock*, 487 F. 2d 637 (C.A. 6). For the reasons discussed above, we believe that these cases are based upon a misinterpretation of *Braverman* and of the congressional intent in enacting Sections 846 and 963. They are, in any event, distinguishable from the present case because they each involved an indivisible, continuous conspiracy stemming from a single agreement. The First and Sixth Circuits both recognized that Congress has the power to condemn different aspects of related conduct if, as here, there are meaningful distinctions between the elements constituting each offense. *United States* v. *Honneus*, *supra*, 508 F. 2d at 569; *United States* v. *Adcock*, *supra*, 487 F. 2d at 639-640.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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